

Sep 30, 2019

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TERRY L.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 4:18-cv-05134-SAB

**ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

Before the Court are the parties' cross-motions for summary judgment, ECF Nos. 11 and 14. The motions were heard without oral argument. For the reasons set forth below, the Court grants Defendant's motion for summary judgment and denies Plaintiff's motion for summary judgment.

JURISDICTION

On March 21, 2014, Plaintiff filed a Title II application for a period of disability and disability insurance benefits on November 3, 2014. Plaintiff also filed a Title XVI application for supplemental security income on November 5, 2014. In both applications, Plaintiff alleged a disability onset date of June 1, 2014. These claims were denied initially on February 19, 2015, and upon reconsideration on August 25, 2014. Thereafter, Plaintiff filed a written request for a hearing.

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1 On August 28, 2017, a hearing was held before an administrative law judge
2 (ALJ). Plaintiff was present and represented by his attorney, Chad Hatfield. An
3 impartial vocational expert was also present at the hearing.

4 The ALJ issued an unfavorable decision on December 18, 2017, AR 13, and
5 the Appeals Council denied Plaintiff's request for review on June 6, 2018. AR 1.
6 Plaintiff filed a timely appeal to the United States District Court for the Eastern
7 District of Washington on August 18, 2018. ECF No. 1. This matter is properly
8 before the Court under 42 U.S.C. § 405(g) and 42 U.S.C. § 1383(c)(3).

9 SEQUENTIAL EVALUATION PROCESS

10 The Social Security Act defines disability as the "inability to engage in any
11 substantial gainful activity by reason of any medically determinable physical or
12 mental impairment which can be expected to result in death or which has lasted or
13 can be expected to last for a continuous period of not less than twelve months." 42
14 U.S.C. § 1382c(a)(3)(A). A claimant shall be determined to be under a disability
15 only if his impairments are of such severity that the claimant is not only unable to
16 do his previous work, but cannot, considering the claimant's age, education, and
17 work experiences, engage in any other substantial gainful work which exists in the
18 national economy. 42 U.S.C. § 1382c(a)(3)(B).

19 The Commissioner has established a five-step sequential evaluation process
20 for determining whether a person meets the definition of disabled under the Social
21 Security Act. 20 C.F.R. § 404.1520(a)(4); *Bowen v. Yuckert*, 482 U.S. 137, 140-42
22 (1987).

23 At step one, the ALJ must determine whether the claimant is presently
24 engaged in "substantial gainful activity." 20 C.F.R. § 404.1520(b). Substantial
25 gainful activity is defined as significant physical or mental activities done or
26 usually done for profit. 20 C.F.R. § 404.1572. If the individual is engaged in
27 substantial gainful activity, he or she is not disabled. 20 C.F.R. § 404.1571. If not,
28 the ALJ proceeds to step two.

1 At step two, the ALJ must determine whether the claimant has a severe
2 medically determinable impairment, or combination of impairments, that
3 significantly limits the claimant's physical or mental ability to do basic work
4 activities. 20 C.F.R. § 404.1520(c). If the claimant does not have a severe
5 medically determinable impairment or combination of impairments, he or she is
6 not disabled. If the ALJ finds the claimant does have a severe impairment or
7 combination of impairments, the ALJ proceeds to step three.

8 At step three, the ALJ must determine whether any of the claimant's severe
9 impairments "meets or equals" one of the listed impairments acknowledged by the
10 Commissioner to be sufficiently severe as to preclude substantial gainful activity.
11 20 C.F.R. §§ 404.1520(d), 404.1525; 20 C.F.R. § 404. Subpt. P. App. 1 ("the
12 Listings"). If the impairment meets or equals one of the listed impairments, the
13 claimant is *per se* disabled and qualifies for benefits. If not, the ALJ proceeds to
14 the fourth step.

15 Before considering step four, the ALJ must determine the claimant's
16 "residual functional capacity." 20 C.F.R. § 404.1520(e). An individual's residual
17 functional capacity is his or her ability to do physical and mental work activities on
18 a sustained basis despite limitations from his impairments. 20 C.F.R. §
19 404.1545(a)(1). In making this finding, the ALJ must consider all of the relevant
20 medical and other evidence. 20 C.F.R. § 404.1545(a)(3).

21 At step four, the ALJ must determine whether the claimant's residual
22 functional capacity enables the claimant to perform past relevant work. 20 C.F.R. §
23 404.1520(e)-(f). If the claimant can still perform past relevant work, he or she is
24 not disabled. If the ALJ finds the claimant cannot perform past relevant work, the
25 analysis proceeds to the fifth step.

26 At step five, the burden shifts to the Commissioner to prove the claimant is
27 able to perform other work in the national economy, taking into account claimant's
28 age, education, work experience, and residual functional capacity. 20 C.F.R. §

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1 404.1520(g). To meet this burden, the Commissioner must establish (1) the
2 claimant is capable of performing other work; and (2) such work exists in
3 significant numbers in the national economy. 20 C.F.R. § 404.1560(c)(2); *Tackett*
4 *v. Apfel*, 180 F.3d 1094, 1099 (9th Cir. 1999).

5 **STATEMENT OF FACTS**

6 The facts have been presented in the administrative transcript, the ALJ's
7 decision, and the briefs to this Court. Only the most relevant facts are summarized
8 here. Plaintiff was born on July 4, 1970. AR 23. Plaintiff testifies that he quit
9 school halfway through the tenth grade and has a fifth grade reading level. AR 45.
10 Plaintiff alleges disability due to hip pain, coronary artery disease, COPD, sudden
11 death syndrome, chronic back and neck pain, and sleep apnea. AR 17

12 **THE ALJ'S FINDINGS**

13 **At step one**, the ALJ found that Plaintiff had not engaged in gainful activity
14 since June 1, 2014. AR 17.

15 **At step two**, the ALJ found that the Plaintiff has the following severe
16 impairments: sleep apnea; chronic obstructive pulmonary disease; substance abuse;
17 degenerative disk disease of the lumbar and cervical spine; mild right hip
18 dysplasia, status post replacement; and coronary artery disease. AR 17.

19 **At step three**, the ALJ found Plaintiff's impairments did not meet or
20 medically equal any of the listed impairments in the listings. AR 18.

21 Before reaching step four, the ALJ found Plaintiff had the residual function
22 capacity:

23 "to perform light work as defined in 20 CFR 404.1567(b) and
24 416.967(b) except he needs to be able to shift positions every 30
25 minutes from sitting, standing, or walking for 5 minutes while
26 remaining at the workstation. He can frequently balance and stoop,
27 occasionally climb stairs and ramps, kneel, crouch, or crawl, and
28 never climb ropes, ladders, or scaffolds. He can frequently reach
overhead bilaterally. He should avoid all exposure to extreme cold,
heat, wetness, humidity, pulmonary irritants, such as fumes, odors,
dusts, gases, and poor ventilation, except occasional exposure to

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1 industrial chemicals, and he should avoid concentrates exposure to
2 moving machinery and unprotected heights. He should have work that
3 consists of simple, routine, repetitive tasks in works that requires
4 minimal math, reading, or writing skills.” AR 18.

5 **At step four**, the ALJ found Plaintiff was unable to perform any past
6 relevant work. AR 23.

7 **At step five**, the ALJ asked the impartial vocational expert whether jobs
8 existed in the national economy for an individual with Plaintiff’s age, education,
9 work experience, and residual functional capacity. The vocational expert testified
10 that given these factors the individual would be able to perform the requirement of
11 representative occupations, such as parking lot attendant, cashier II, and assembler
12 small products. AR 24. As a result, the ALJ found Plaintiff was not disabled, as
13 defined in the Social Security Act. AR 24.

14 **STANDARD OF REVIEW**

15 A district court’s review of a final decision of the Commissioner is governed
16 by 42 U.S.C. § 405(g). The scope of review under Section 405(g) is limited, and
17 the Commissioner’s decision will be disturbed “only if the ALJ’s decision was not
18 supported by substantial evidence in the record as a whole or if the ALJ applied the
19 wrong legal standard.” *Shaibi v. Berryhill*, 883 F.3d 1102, 1106 (9th Cir. 2017).
20 “The findings of the Commissioner of Social Security as to any fact, if supported
21 by substantial evidence, shall be conclusive.” 42 U.S.C § 405(g).

22 “Substantial evidence” is defined as “such relevant evidence as a reasonable
23 mind might accept as adequate to support a conclusion.” *Molina v. Astrue*, 674
24 F.3d 1104, 1121 (9th Cir. 2012). However, when determining whether substantial
25 evidence exists, a reviewing court “must consider the entire record as a whole,
26 weighing both the evidence that supports and the evidence that detracts from the
27 Commissioner's conclusion, and may not affirm simply by isolating a specific
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1 quantum of supporting evidence.” *Garrison v. Colvin*, 759 F.3d 995, 1009 (9th Cir.
2 2014).

3 Reversal of the Commissioner’s decision is not warranted unless an error or
4 omission is not harmless. *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir.
5 2008). The burden of showing an error is harmful generally falls upon the party
6 appealing the ALJ’s decision. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

7 **ISSUES FOR REVIEW**

8 (1) Whether the ALJ erred in weighing Plaintiff’s subjective symptom claims?

9 (2) Whether the ALJ properly erred in weighing the expert medical evidence?

10 (3) Whether any error was harmful?

11 **DISCUSSION**

12 **(1) Plaintiff’s Subjective Symptom Claims**

13 Plaintiff argues the ALJ improperly rejected his testimony regarding the
14 severity of his symptoms. An ALJ engages in a two-step analysis to determine
15 whether a claimant’s testimony regarding subjective pain or symptoms is credible.
16 *Garrison v. Colvin*, 759 F.3d 995, 1014 (9th Cir. 2014). “First, the ALJ must
17 determine whether the claimant has presented objective medical evidence of an
18 underlying impairment ‘which could reasonably be expected to produce the pain or
19 other symptoms alleged.’” *Id.* (quoting *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036
20 (9th Cir. 2007)). In this analysis, the claimant is not required to show “that [his]
21 impairment could reasonably be expected to cause the severity of the symptom
22 [he] has alleged; [he] need only show that it could reasonably have caused some
23 degree of that symptom.” *Smolen v. Chater*, 80 F.3d 1273, 1282 (9th Cir. 1996). If
24 the claimant satisfies the first step of this analysis, and there is no evidence of
25 malingering, “the ALJ can reject the claimant’s testimony about the severity of
26 [his] symptoms only by offering specific, clear and convincing reasons to do so.”
27 *Id.* at 1281.
28

1 In this case, the ALJ found Plaintiff's medically determinable impairments
2 could reasonably be expected to cause the alleged symptoms. AR 19. However, the
3 ALJ found Plaintiff's statements concerning the intensity, persistence and limiting
4 effects of these symptoms were inconsistent with the objective medical evidence.
5 AR 19.

6 *(a) The ALJ Offered Valid Reasons for Discrediting Plaintiff's Testimony*

7 The ALJ's reasoning satisfies the clear and convincing standard. The ALJ
8 noted inconsistencies between Plaintiff's testimony and the record and noted
9 reasons to discredit Plaintiff's testimony generally.

10 The ALJ points to medical reports that show that Plaintiff told Dr. Woolever
11 he was performing certain tasks that in his hearing Plaintiff testified he could not
12 do: such as camping in his trailer, including picking up and moving his camp;
13 remodeling his home; and repairing his motor home and shopping. AR 21.
14 Additionally, the ALJ pointed to a psychological report by Dr. Ronald Page where
15 Plaintiff reported that he quit working not due to his own pain, but rather, due to
16 the needs of caring for his wife and father. AR 21.

17 Further, the ALJ discounted Plaintiff's testimony because medical reports
18 showed that Plaintiff reported no current heart pain and that his coronary artery
19 disease was stable in 2017, contrary to Plaintiff's testimony. AR19. Plaintiff's past
20 drug use and failure to stop smoking tabaco and marijuana, against the
21 recommendation of his doctors, also contributed to the ALJ discrediting Mr.
22 Lanning's pain and symptom persistence. AR 21.

23 The ALJ used the same reasoning to discount the third-party function report
24 from Margo Lanning, Mr. Lanning's wife. Because Ms. Lanning claimed the same
25 limitations for Mr. Lanning that the ALJ believed were inconsistent with the
26 medical records this evidence was also appropriately given low weight. AR 22.

1 The Court finds the ALJ's reasons for discrediting Plaintiff's testimony, and the
2 third party testimony, are valid and legally sufficient.

3 **(2) Medical Opinion Evidence**

4 Plaintiff argues the ALJ failed to properly consider and weigh the medical
5 opinion evidence. In the absence of a contrary opinion, a treating physician's
6 opinion may not be rejected unless "clear and convincing" reasons are provided.
7 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). If a treating physician's opinion
8 is contradicted, it may be discounted only for "'specific and legitimate reasons'
9 supported by substantial evidence in the record." *Id.* at 830 (quoting *Murray v.*
10 *Heckler*, 722 F.2s 499, 502 (9th Cir. 1983). The ALJ can meet this burden by
11 setting out a detailed and thorough summary of the facts and conflicting clinical
12 evidence, stating his interpretation thereof, and making findings." *Magallanes v.*
13 *Bowen*, 881 F.2d 747, 751 (9th Cir. 1989).

14 In this case, Plaintiff argues the ALJ improperly rejected the opinions of
15 treating physicians Dr. Woolever and Dr. Henderson, and failed to address a
16 reviewing physician, Dr. Palasi's, opinion at all.

17 *(a) Dr. Woolever*

18 In May of 2015 Plaintiff's primary care physician Dr. Woolever's medical
19 report stated that Plaintiff was "severely limited," and "unable to meet the demands
20 of work". ECF 8-7 No. 16F at 8. This determination was made based off three
21 diagnoses: coronary artery disease, COPD, and hip pain. ECF 8-7 No. 16F at 7. Dr.
22 Woolever assigned severity ratings of 5 to Plaintiff's COPD and hip pain, and a
23 severity rating of 4 to Plaintiff's coronary artery disease. *Id.* at 5. In his report Dr.
24 Woolever states that this limitation on work activities would persist for 99 months
25 with available medical treatment. *Id.* at 8. The ALJ gave little weight to this
26 testimony, chiefly because of Dr. Woolever's more recent medical reports which
27 reflect marked improvement after treatment. The 2015 evaluation was done prior
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1 to Plaintiff's treatment for his heart problems, which were "resolved after stent
2 placement." AR 23. Dr. Woolever, in a series of follow up visits in 2016, stated
3 that the COPD and coronary artery disease are under control, even stating "no
4 current symptoms that appear worrisome," in February of 2016. ECF 8-7, No. 15F
5 at 32. This specific and legitimate reason for assigning low weight to Dr.
6 Woolever's 2015 report was not error.

7 *(b) Dr. Henderson*

8 In May of 2017 Dr. Richard Henderson's medical report stated that Plaintiff
9 was unable to work for a period of three months as he was recovering from hip
10 surgery. ECF 8-7, No. 16F at 2. The ALJ gave little weight to this assessment as it
11 related to Plaintiff's ability to work, because the 3-month time period did not
12 constitute a long enough period of time to qualify as a disability and Plaintiff was
13 expected to recover and be able to work after that three-month time period. AR 22.
14 The ALJ gave a clear and convincing reasoning as to why Dr. Henderson's
15 medical evidence was given little weight.

16 *(c) Dr. Palasi*

17 Plaintiff argues that the ALJ erred by not addressing DSHS physician Dr.
18 Palasi's medical evidence. An ALJ must consider prior medical evidence from
19 state or federal agencies. "Administrative law judges are not required to adopt any
20 prior administrative medical findings, but they must consider this evidence." 20
21 C.F.R. § 404.1513a(b)(1). The ALJ did not address Dr. Palasi's testimony and thus
22 erred. AR 15. The Court must determine whether the error is harmless.

23 **(3) Harmless Error**

24 Reversal of an SSA adjudication on account of error requires a determination of
25 prejudice and the burden is on the party claiming the error to demonstrate not only
26 that the error exists but also that the error affected both the procedural rights and

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1 substantial rights of the claiming party. *Ludwig*, 681 F.3d at 1054 (9th Cir. 2012).
2 An error is harmless if “there remains substantial evidence supporting the ALJ's
3 decision and the error “does not negate the validity of the ALJ's ultimate
4 conclusion.” *Molina*, 674 F.3d at 1115 (9th Cir. 2012).

5 In May of 2015, Dr. Myrna Palasi performed an evaluation of Plaintiff's
6 medical records, without examining Plaintiff. ECF 8-7, No.16F at 11. Dr. Palasi
7 concluded that Plaintiff had a less than sedentary level of work, assigning a
8 severity rating of 4 to Plaintiff's coronary artery disease, and a level of 5 to
9 Plaintiff's COPD. ECF 8-7, No.16F at 15. Plaintiff's hip issues did not have a
10 major impact on this disability incapacity determination in 2015. *Id.* Dr. Palasi's
11 May of 2015 opinion on Plaintiff's COPD was based on her review of Dr.
12 Woolever's 2015 report, which the ALJ appropriately gave low weight in light of
13 the 2016 follow-up.

14 In May of 2017, Dr. Palasi again reviewed the medical reports from Dr.
15 Woolever from May of 2015, Dr. Richard Henderson from May of 2017, and other
16 medical documents from Providence St. Mary Medical Center from March of
17 2017. *Id.* Dr. Palasi's evaluation concluded that Plaintiff was unable to perform
18 activities at heavy, medium, light and sedentary exertion levels. *Id.* at 8. Dr. Palasi
19 concluded the highest level of work Plaintiff could perform was “less than
20 sedentary.” *Id.* In the 2017 report Dr. Palasi gave a severity rating of 2 to both
21 Plaintiff's COPD and coronary artery disease and a severity level of 5 to Plaintiff's
22 hip issues. *Id.* at 9. Again, Dr. Palasi's determination of Plaintiff's COPD and
23 coronary artery disease were based upon Dr. Woolever's then-outdated 2015
24 report, and not the 2016 follow-up detailing Plaintiff's better-than-expected
25 response to treatment. Likewise, Dr. Palasi's determination of Plaintiff's hip issues
26 was based upon Dr. Henderson's opinion, which the ALJ appropriately gave low
27 weight.
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1 The ALJ gave low weight to the medical records which formed the basis of
2 Dr. Palasi's review, and for the same reasons, would have given Dr. Palasi's
3 opinions formed based upon those records low weight. The ALJ's failure to
4 address Dr. Palasi's expert testimony would have made no difference in the
5 outcome of the ALJ's opinion. The ALJ's error in failing to extend the reasons for
6 giving low weight to Dr. Henderson and Woolever's reports to Dr. Palasi's review
7 of those records was therefore harmless.

8 **CONCLUSION**

9 Having reviewed the administrative record and the ALJ's findings, the Court
10 finds the ALJ's decision is supported by substantial evidence and any errors were
11 harmless.

12 Accordingly, **IT IS HEREBY ORDERED:**

- 13 1. Plaintiff's Motion for Summary Judgment, ECF No. 11, is **DENIED**.
- 14 2. Defendant's Motion for Summary Judgment, ECF No. 14, is **GRANTED**.
- 15 3. The decision denying benefits is **AFFIRMED**.
- 16 4. The District Court Executive is directed to enter judgment in favor of
17 Defendant and against Plaintiff.

18 **IT IS SO ORDERED.** The District Court Clerk is hereby directed to enter
19 this Order, provide copies to counsel, and **close the file**.

20 **DATED** this 30th day of September 2019.



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A handwritten signature in blue ink, reading "Stanley A. Bastian", is written over a horizontal line.

26 Stanley A. Bastian
27 United States District Judge
28